

April 22, 2022

Submitted via FOIA Online

National Freedom of Information Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, D.C. 20460
(202) 566-1677
hq.foia@epa.gov

Re: FOIA Request for Copies of Health and Safety Studies of 20 High-Priority Substances and 30 Organohalogen Flame Retardants Submitted Pursuant to the Toxic Substances Control Act Health and Safety Data Reporting Rule

Dear Freedom of Information Officer:

Earthjustice and Alaska Community Action on Toxics (“ACAT”) (collectively, the “Requesters”) submit this request, in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to the Environmental Protection Agency (“EPA”) for copies of unpublished health and safety studies submitted to EPA pursuant to the Toxic Substances Control Act (“TSCA”) Health and Safety Data Reporting Rule, Health and Safety Data Reporting; Addition of 20 High-Priority Substances and 30 Organohalogen Flame Retardants, 86 Fed. Reg. 34,147, 34,149 (June 29, 2021) (to be codified at 40 C.F.R. pt. 716) (“Final Rule”), which was promulgated under TSCA section 8(d), 15 U.S.C. § 2607(d).

DEFINITIONS

The Requesters seek the unredacted records listed below. The use of the word “unredacted” means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you cannot disclose all of the information contained in a particular record, please provide us with a copy of the record with redactions of only the information that you have determined to be properly withheld and explain the basis for your determination that such information must be withheld.

RECORDS REQUESTED

Pursuant to TSCA section 8(d)(2), 40 C.F.R. § 716.30, and the Final Rule codified at 40 C.F.R. § 716.21(a)(9), (10), “persons”¹ must submit to EPA “copies of stud[ies] contained on a list submitted pursuant to [TSCA section 8(d)(1)]” specified in 40 C.F.R. § 716.21(9) and (10). The deadlines for submitting these copies to EPA were December 1, 2021, for high-priority substances, and January 25, 2022, for organohalogen flame retardants (“OFRs”). In accordance with FOIA, please provide us with the aforementioned “copies” of health and safety studies submitted to EPA, pursuant to the Final Rule.

¹ 40 C.F.R. § 716.5.

RECORD DELIVERY

To the extent practicable, the Requesters seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (stating that the agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA's possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."² If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding;
- (5) If you do not use your discretion to release such complete and unredacted records: (a) examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and, (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld.

FEE WAIVER REQUEST

I. THIS FEE REQUEST SATISFIES THE FIRST FEE WAIVER REQUIREMENT AS THE REQUEST IS IN THE PUBLIC INTEREST.

Pursuant to 5 U.S.C. § 552, we request a waiver of fees that EPA would otherwise charge for searching and producing the records described above, because this request satisfies both fee waiver requirements. First, FOIA dictates that requested records be provided without charge because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(l)(1). To determine whether the FOIA request meets this first fee waiver requirement, EPA analyzes four factors: (i) the subject of the request; (ii) the informative value of the information to be disclosed; (iii) the contribution to an understanding of the subject to the public; and (iv) the significance of the contribution to the public understanding. 40 C.F.R. § 2.107(l)(2)(i)–(iv). As demonstrated

² Memorandum from the Att'y General to Heads of Exec. Dep'ts & Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

below, all of the four factors related to the first fee waiver requirement, as specified in EPA's FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request.

i. The Requested Records Concern the Operations or Activities of the Federal Government.

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they are records submitted to EPA under the Final Rule, promulgated pursuant to TSCA section 8(d). The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government.³ There is no question that this is such a case.

ii. Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities.

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. First, these health and safety studies are “unpublished,” 86 Fed. Reg. at 34,147, and thus, inaccessible to the general public. Second, EPA has requested these copies from chemical manufacturers and importers in order to inform its risk evaluation processes of the 20 high-priority substances and the prioritization and risk evaluation processes of the 30 OFRs. 86 Fed. Reg. 34,151. Thus, disclosure of the requested information will enable the public to better understand the scope of information EPA will be relying on when undertaking these TSCA processes for the 20 high-priority substances and 30 OFRs.

iii. Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Health and Safety Effects of the 20 High-Priority Substances and 30 OFRs.

EPA next considers whether disclosure will contribute to “understanding of the subject by the public.” 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, “as opposed to the individual understanding of the

³ U.S. Dep’t of Justice, Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>.

requester.” *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” the health and safety effects of the 20 high-priority substances and 30 OFRs. As EPA has described, the 20 high-priority substances “have been designated” as such “because EPA has found that each of these chemical substances may present unreasonable risk of injury to health or the environment.” 86 Fed. Reg. at 34,150. Moreover, EPA has also found that “many [OFRs] have been shown to cause health effects” including “carcinogenicity . . . , developmental effects . . . , and developmental neurotoxicity.” *Id.* There is a broad interest from the public in better understanding the extent of these adverse health outcomes.

The Requesters have the “ability and intention to effectively convey [this] information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice is a nonprofit environmental organization composed of, but not limited to, attorneys, scientists, communication specialists, and policy advocates. It has made the promotion of safe and healthy communities free from the health burdens of toxic chemicals a top priority, and it has been actively engaged in the TSCA prioritization, risk evaluation, and risk management processes. It has previously commented on the Final Rule and has interest and expertise in the 20 high-priority substances and 30 OFRs, including undertaking litigation or commenting on rulemakings pertaining to these specified chemicals. Alaska Community Action on Toxics is a nonprofit organization with a focus on protecting Alaska communities from exposures to toxic chemicals, including flame retardants and phthalates, which tend to accumulate in the Arctic. ACAT advocates at the international and national level to reduce such exposures and associated harms to human health and the environment. It employs scientific experts who are continuously involved in conveying information regarding the health effects of toxic chemicals to the broad public. It is heavily engaged in public comments and litigation involving substances that these health and safety studies pertain to. Thus, Requesters are well-prepared to evaluate the requested records once received.

The Requesters also have mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. The Requesters are well-positioned to share the requested information with interested audiences. Earthjustice’s email list includes 1.8 million people, its website receives approximately 530,000 page views per month, and its quarterly print magazine has a circulation of approximately 100,000. Earthjustice employs or retains communications professionals who can disseminate newsworthy information obtained from this request to the media. ACAT publishes quarterly newsletters, circulates weekly email communications, and makes daily social media posts with a community of more than 17,000 supporters and followers. It also publishes news releases and investigative reports on chemicals, such as flame retardants, that are of concern to Alaska communities.

iv. The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA’s website or internet searches. Thus, the public’s understanding of these health and safety studies “will be significantly enhanced by the disclosure.” *See* 15 C.F.R. § 4.11(l)(2)(iv).

II. THIS REQUEST SATISFIES THE SECOND FEE WAIVER REQUIREMENT AS REQUESTERS HAVE NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS.

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because the Requesters do not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(3). The Requesters are 501(c)(3) nonprofit organizations, and they do not have any “commercial interest that would be furthered by the requested disclosure” of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of their respective missions to inform and protect the public on matters of vital importance to the environment and public health. Further, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

INSTRUCTIONS FOR RECORD DELIVERY

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must . . . indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point should EPA’s search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Eve Gartner
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
egartner@earthjustice.org

If you find that this request is unclear or if the responsive records are voluminous, please contact me at egartner@earthjustice.org or 212-845-7381 to discuss the proper scope of this request. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Eve C. Gartner". The signature is written in a cursive, flowing style.

Eve C. Gartner